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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U.S.
FILED
JUN 17 1974
MICHAEL RODAK, JR., CLERK

No. 73-1353

UNITED STATES OF AMERICA,

Respondent,

v.

IRA S. BUSHEY & SONS, INC., TANKER HYGRADE NO. 8 INC., SPENTONBUSH TRANSPORT SERVICE, INC.,

Petitioners,

NORTHERN OIL COMPANY, INC., and NORTHERN TERMINALS, INC.,

Defendants.

MOTION AND BRIEF FOR *AMICUS CURIAE* AMERICAN WATERWAYS OPERATORS, INC. FILED IN SUPPORT OF PETITIONERS

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The American Waterways Operators, Inc. (hereinafter AWO), moves this Court, pursuant to rule 42(1a) of the Revised Rules (1972) for leave to file the accompanying brief as *amicus curiae*. The consent of the petitioners has been obtained.

The interests of the movant in this case and its reasons for requesting leave to file the accompanying brief *amicus curiae* appear below.

Movant is a non-profit trade association representing the national interests of operators of non self-propelled barges, towboats and tugboats providing transportation services of oil and other hazardous products as the latter are defined in 33 USC 1321. AWO members operate vessels on the United States navigable inland waters and over coastal and seagoing routes in all areas of the country. The association's executive office is in Washington, D. C. It has regional offices in New York, N. Y. and New Orleans, La. AWO has over 250 members, of which more than 180 operate barges and towing vessels performing transportation of oil, hazardous commodities and other products.

Barges pushed by towing vessels on inland waters and pulled or pushed by such vessels on offshore coastal routes in the Gulf of Mexico and along the east and west coasts of the United States move over 15 percent of the total United States domestic commerce. Over 20,947 barges are so engaged, as are 4,278 tugboats to propel such barges. In 1972 (the last year for which data is available) the total tonnage transported by barges amounted to 597,255,337 tons, approximately 60 percent of which was oil and other fuel.

The interest of AWO and each of its members are vitally affected by the decision below since the District Court in creating regulations relating to the discharge of oil products, has infringed on an area totally preempted by federal legislation, specifically the authority delegated by the Congress to issue vessel regulations.

Aside from these basic issues which petitioners present to the Court, the decision below has created a situation which to movant and to the entire shipping community is of major significance and serious concern. If allowed to stand the decision below would allow Courts throughout the country to impose different regulations as to oil vessel operation that may not only conflict with Coast Guard regulations, but may also conflict with each other.

The effect of such a rule on the water transportation of oil between states is clear. In the course of a year a barge of the type operated by members of AWO usually will call at ports in numerous states. If its base of operations is on the Mississippi River it may visit practically every state bordering thereon. If based on a North Atlantic port, it may call at every Atlantic coastal state. If the District Court in each district of those states has jurisdiction to issue its own rules and regulations applicable to one or more barge owners the confusion which will result is obvious.

We urge, therefore, that the decision of the lower court be vacated and the subject and regulation of oil carriage be left to the Coast Guard as clearly intended by Congress.

Movant, accordingly, requests leave to file the accompanying brief so that these issues which are of great importance to the oil carrying industry can be presented to the court.

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BRIEF OF AMERICAN WATERWAYS OPERATORS, INC., AS *AMICUS CURIAE*

The Interest of American Waterways Operators, Inc., *Amicus Curiae*

The American Waterways Operators, Inc. (AWO) is a non-profit trade association representing the national interests of operators of non self-propelled barges, towboats and tugboats providing transportation services including transportation of oil and hazardous products as the latter are defined in 33 USC 1321. AWO members operate vessels on the United States navigable inland waters and over coastal and seagoing routes in all areas of the country. The association's executive office is in Washington, D.C. It has regional offices in New York, N.Y. and New Orleans, La. AWO has over 250 members, of which more than 180 operate barges and towing vessels performing transportation services of oil, hazardous commodities and other products.

Barges pushed by towing vessels on inland waters and pulled or pushed by such vessels on offshore coastal routes in the Gulf of Mexico and along the east and west coasts of the United States move over 15 percent of the total United States domestic commerce. Over 20,947 barges are so engaged, as are 4,278 tugboats to propel such barges. In 1972 (the last year for which data is available) the total tonnage transported by barges amounted to 597,255,337 tons, approximately 60 percent of which was oil and other fuel.

The interest of the association in this case is:

The legal issue whether a United States District Court has jurisdiction to issue an injunction which in effect requires compliance with new regulations promulgated for

the first time by the Court governing the operation, within that Court's territorial jurisdiction, of vessels subject to inspection and regulation by the United States Coast Guard (Department of Transportation) and licensed to carry on the coastwise trade.

ARGUMENT

POINT I

The District Courts do not have jurisdiction to impose regulations upon the operation of vessels subject to inspection and regulation by the the United States Coast Guard and licensed to carry on the coastwise trade.

The District Court found that defendants' barges, which are the subject of the majority of regulations imposed upon defendants, had been issued Certificates of Inspection by the United States Coast Guard (Finding No. 11).[1] Such inspection was carried out pursuant to 46 USC 391a(2) and 46 USC 391a(5)[2] providing that vessels carrying inflammable or combustible liquid cargo or oil in bulk should be considered steam vessels and subject to the provision of the statutes relating thereto. (See also 46 USC 170, applicable to vessels transporting explosives or like dangerous cargo.)

46 USC 391a is specific and complete in its delegation to the Coast Guard of the obligation to establish, for the involved type of craft, such additional rules and regulations as may be necessary with respect to the design, construction, alteration, repair, maintenance, manning and duties and qualifications of officers and crew of such vessels. Support for this position can be found in 46 USC 391a(3) which calls for the Secretary of the department

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[1] Cf. p. 3A of petition for writ.

[2] Set forth at pp. 38a and 41a of petition for writ.

in which the Coast Guard is operating to establish such rules and regulations with regard to the vessels in question.

That the legislature intended that the Coast Guard and not the District Courts be charged with the duty of amending and supplementing these rules can be found in section 203 of Public Law 92-340[1] which requires annual reports to Congress from the Secretary of the department in which the Coast Guard is operating for the ten years following the effective date of 46 USC 391a (July 10, 1972).

> "Such report shall include but not be limited to
>
> (A) A description of the rules and regulations prescribed by the Secretary
>
> • • • • • •
>
> (iii) to reduce damage to the marine environment from the normal operation of the vessels to which this title applies."

(1972 US Code Cong. & Admin. News at 516.)

In deciding what Congress intended by the words "normal operation of the vessels" it is unnecessary to look any farther than section 391a(1) where Congress specifically declared that the carriage of certain types of cargo "creates substantial hazards to life, property, the navigable waters of the United States (including the quality thereof) and the resources contained therein." This language clearly acknowledges that the carriage of oil is a dangerous matter, which Congress saw fit to leave to the expertise of the Coast Guard, not the District Courts.

Further support for the position that Congress intended that the Coast Guard and no other body be charged with this rule-making power is that pursuant to section 203, P.L. 92-340, the annual report called for requires a "description of the rules and regulations prescribed by the Secretary" (1972 US Code Cong. & Admin. News at 516).

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[1] See Appendix B page 1a *infra*.

The fact that such a description is requested every year is a clear indication that the Secretary would be changing these regulations. Nowhere is there a request for rules promulgated by the various District Courts.

In an introduction to its regulations[1] the Coast Guard clearly sets forth the Congressional intent of Section 203 P.L. 92-340 (1972 U.S. Code Cong. & Admin. News at 516), and the broad national policy to reduce oil pollution, where it stated:

> "Recognizing this Nation's social and industrial dependence upon oil, these regulations are intended to provide maximum protection to the environment while remaining within economic and practical bounds." 37 FR 28250

Additionally, 33 USC 1321j(1)[2] provides for the promulgation by the President of regulations "establishing procedures, methods, and equipment to prevent discharges of oil and hazardous substances from vessels . . . and to contain such discharges and for inspection of vessels carrying cargoes of oil and hazardous substances." The President delegated to the Secretary of Transportation responsibility for issuance of those regulations (Executive Order July 20, 1970, 35 FR 11677).

Under date of December 14, 1972 the Coast Guard (Department of Transportation) issued complete and far-reaching regulations for the transfer of cargoes from all types of vessels, propelled and non self-propelled (barges) (37 Fed. Reg. No. 246 Pt. II, 12/21/72). In comparison, the majority of the regulations imposed by the Court relate also to transfer of oil from barges to shore terminals, thus duplicating but enlarging upon the Coast Guard's regulations.

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[1] See Appendix C page 29 *infra*.

[2] See petitioners' Appendix H page 37a.

As a result of the above it is clear that Congress has provided for the complete and substantial regulation of the transportation of oil by barge and its transfer to shore facilities. These regulations, promulgated and subject to amendment by the Coast Guard under congressional authority, pre-empt action by any other agency to promulgate duplicative or conflicting regulations whether the agency be a State or United States District Court.

A second important factor to consider is the expertise possessed by the Coast Guard in the specialized field of promulgating regulations for vessel design, manning, equipment, operation and general safety, and the District Court's lack of that expertise. In the record of the case we can refer to two such examples, which do not reflect on the judicial ability of the trial Court. At one point in a discussion concerning Coast Guard regulations the Court stated it was "pretty much of a novice in this regard." Appendix, *infra* p. 1a.

Again, referring in its opinion to the Coast Guard regulations the Court stated it could "see no earthly distinction in the necessity of deck lighting between a self-propelled and a non self-propelled vessel other than a limited item of expense, perhaps." Appendix A to petitioners' brief p. 24A. Yet the Coast Guard could and did comprehend such distinction, which it made plain in its regulations, sections 155.790 37 FR 28259 and 154.570(3), 37 FR 28255 providing that a self-propelled vessel must supply the lighting but in the case of a barge the terminal must do so. It is a matter of knowing from experience the design and capabilities of the different types of vessels.

In this case the Court required of defendants that at least one employee aboard a tank vessel hold a valid tankerman's certificate.[1] If the District Court of Vermont is declared to have such authority to make such requirement, any other District Court could require that there be at least two or three men aboard holding valid tankerman's certificates.

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[1] Petitioners' Appendix p. 27a—Item 7.

We submit that, under the principle of division of powers a United States Court cannot and should not attempt to regulate vessels licensed to carry on the coastwise trade, under the guise of public nuisance or any other form of injunctive relief.

A third and final factor to be considered is the far reaching effect the decision of the lower court will have on each and every member of AWO. The possibility of the numerous district courts imposing different, and in some cases conflicting regulations on AWO member effects not only AWO members, but users of the product carried by AWO members throughout the country.

In the course of a year a barge of the type operated by members of AWO usually will call at ports in numerous states. If its base of operations is on the Mississippi River it may visit practically every state bordering thereon. If based on a North Atlantic port, it may call at every Atlantic coastal state. If the District Court in each district of those states has jurisdiction to issue its own rules and regulations applicable to one or more barge owners the confusion which will result is obvious.

There is ample precedent in this Court's history for striking down regulations applicable to a limited jurisdiction (e.g. a state) where the regulation will effectively burden commerce between the several states.

In *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945), this Court held unconstitutional an Arizona statute which placed a limitation on the length of all trains traveling within the state of Arizona. In discussing the far-reaching effect of the statute and the burden it would place on commerce this Court at page 775 stated:

> "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the

boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state. *The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent.*" (Italics supplied)

The language quoted above is particularly applicable to the instant case, in that the Coast Guard, by Congressional delegation, has been designated the single administrative body responsible for promulgating rules concerning oil carrying vessels. The attempt by the District Court to substitute its own judgment for that of Coast Guard not only circumvents Congressional intent, but creates a burden to commerce which this Court has already deemed unconstitutional.

A case very similar to *Southern Pacific, supra* and decided some fourteen years later is *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). In that case, the State of Illinois passed a statute requiring a particular type of rear fender mudguard on all trucks and trailers traveling the highways of that state. Again, this Court held that provision unconstitutional on the ground that it interfered with the free flow of commerce between the states. Significant in the Court's determination was the fact that "the statute, taken together with a Rule of Arkansas Commerce Commission requiring [different type] of flaps rendered the use of the same motor vehicle equipment in both states impossible.

The fact that the instant case speaks to regulations imposed by a District Court rather than a state statute does not in any way affect the ultimate evil sought to be eliminated—a burden on commerce between the states.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Excerpt From Page 82 of Joint Appendix Filed in the United States Court of Appeals for the Second Circuit.

Mr. Heckman: I submit, Your Honor, the regulations speak for themselves.

The Court: Yes, they do, but since the Court is pretty much a novice in this regard, I will be interested in having the Captain's guidance to the regulations. It may save us all some time.

APPENDIX B

Text of Sec. 203 of P.L. 92-340.

Sec. 203. The Secretary of the Department in which the Coast Guard is operating shall, for a period of ten years following the enactment of this title, make a report to the Congress at the beginning of each regular session, regarding his activities under this title. Such report shall include but not be limited to (A) a description of the rules and regulations prescribed by the Secretary (i) to improve vessel maneuvering and stopping ability and otherwise reduce the risks of collisions, groundings, and other accidents, (ii) to reduce cargo loss in the event of collisions, groundings, and other accidents, and (iii) to reduce damage to the marine environment from the normal operation of the vessels to which this title applies, (B) the progress made with respect to the adoption of international standards for the design, construction, alteration, and repair of vessels to which this title applies for protection of the marine environment, and (C) to the extent that the Secretary finds standards with respect to the design, construction, alteration, and repair of vessels for the purposes set forth in (A) (i), (ii), or (iii) above not possible, an explanation of the reasons therefor.

APPENDIX C

Text of Introduction to Coast Guard Regulations Fed. Reg. Vol. 37, No. 246, Part II, Page 1.

TITLE 33—NAVIGATION AND NAVIGABLE WATERS

Chapter I—Coast Guard, Department of Transportation

Subchapter O—Pollution

[CCD 71—160R]

POLLUTION PREVENTION VESSEL AND OIL TRANSFER FACILITIES

1. *Description and purpose of action.* The U.S. Coast Guard, acting under the authority of section 311(j) of the Federal Water Pollution Control Act, as amended (FWPCA), intends to issue regulations governing the design, construction, and operation of vessels operating in the navigable waters and contiguous zone of the United States, and governing the design, construction, and operation of onshore and offshore facilities engaged in the transfer of oil in bulk (more than 250 barrels) to and from vessels.

The purpose of these regulations is to reduce the probability of an accidental discharge of oil or oily wastes during normal vessel operations, during the bulk transfer of oil or oily wastes to or from vessels, or as a result of certain vessel accidents of limited energy. Although the high-energy collision or grounding is spectacular and may create locally severe environmental degradation, more significant and continuous degradation generally results from the regular and frequent discharges of oil into the waters of the United States. Furthermore, it is believed that the most effective means of minimizing the ecological damage of high-energy accidents is to prevent their occurence through operational controls external to the vessel. The recently enacted Bridge-to-Bridge Communica-

tions Act and Ports and Waterways Safety Act should provide this control.

The final regulations are set forth below and constitute a part of this statement.

2. *Probable environmental impact.* The expected impact of these regulations is a reduction in the amount of oil discharged into the navigable waters of the United States.

The magnitude of the incidents at which these regulations are aimed is not known with certainty at this time. It is clear that not all discharges of harmful quantities of oil are reported and that quantities of reported discharges are often underestimated. For this reason thorough assessment of the impact of these regulations on oil pollution can only follow an initial period of actual regulation. In general, vessel casualties involving a discharge of oil are relatively infrequent and result in medium or major incidents. Discharges during transfer operations are generally more frequent and involve minor or medium incidents, though the potential for a major incident is present whenever large quantities of bulk cargo are handled. It is anticipated that in combination with vessel traffic systems and vessel construction requirements to be developed under authority of the Ports and Waterways Safety Act of 1972, the preventive regulations will significantly request the incidence of discharges of oil into U.S. waters.

3. *Adverse environmental effects.* There are no expected adverse environmental effects.

4. *Alternatives.* The Coast Guard has available two distinct alternative courses of regulatory action:

a. Take no action and continue to enforce civil penalties without the benefit of preventive regulation. This course is the "status quo" alternative. Penalty enforcement, however, involves the disadvantage of post-factum action—viz., the damage has already been done. Vigorous penalty

action can have only a limited impact upon faulty equipment or procedures which persist in use because of ignorance, indifference, or competitive pressure. The goal of the intended action is to promote oil-free water resources by removing the costs of environmental protection from the competitive arena and making them a fixed cost of operation applicable to all businesses.

b. Issue regulations more stringent than those described in this statement. To do so is to increase the additional cost of compliance out of proportion to the additional enhancement of the marine environment. The public costs of complying with the regulations the Coast Guard intends to promulgate are not precisely known. The regulations, however, based upon comments received at the public hearing, are considered to be a reasonable attempt to deal with known problems at a not unreasonable public cost. In the extreme, oil pollution might be virtually eliminated by issuing regulations so onerous as to make oil transfer or vessel operations economically unfeasible.

Stronger regulations could establish a requirement for persons engaged in oil transfer operations to obtain a permit issued by the Coast Guard. A formal permit system would produce a current inventory of all oil-handling facilities and allow inspection and control of such facilities to determine the adequacy of the physical plant, personnel, and procedures. A permit program of this kind was included in the Notice of Proposed Rule Making for the preventive regulations but has been withdrawn by the Coast Guard for the present time. A discussion of the permit system is contained in the preamble to the final regulations.

Besides these alternatives available to the Coast Guard, there are at least two broad alternative national policies which would significantly reduce oil pollution in U.S. waters. One alternative is to reduce the national demand for oil and thereby to reduce the amount of oil transported by tank vessel and transferred at marine facilities. This reduction might be brought about by one of two means.

Demand for oil could be arbitrarily reduced by placing a substantial tax upon the production, transport, or consumption of oil or by establishing a system of rationing or other controls. On the other hand, demand for oil could be more naturally reduced (i.e., without disrupting market forces) by developing alternative sources of energy, such as natural or synthetic gas, nuclear power, solar energy, or geothermal steam. A second national alternative is to promote a substitute for transshipment of oil by waterborne vessel. Other modes of transportation might include pipelines, rail or truck tank cars, or even transmission of electricity generated at oil sources.

The Coast Guard regulations described in this statement represent an attempt to achieve oil-free waters through a reasonable balance of punitive deterrence and modification of design, construction, and operation intended to minimize the opportunity for and the effects of human error or negligence. Recognizing this Nation's social and industrial dependence upon oil, these regulations are intended to provide maximum protection to the environment while remaining within economic and practical bounds. The regulatory process, however, is dynamic and evolutionary. As our experience and information improve, the preventive regulations will be modified as necessary.

5. *Relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity.* Studies showing that oil can be harmful to marine organisms lead biologists to believe that chronic or excessive introduction of petroleum and its products into marine ecosystems may seriously disrupt those systems. Therefore, reducing the quantity of oil being discharged into U.S. waters is beneficial to both the short-term uses and the long-term productivity of the marine environment.

6. *Commitments of environmental resources.* This action does not result in any irreversible or irretrievable commitment of environmental resources.

7. *Government, public, and industry problems or objections.* The Coast Guard's proposed regulations were widely disseminated to interested parties and were the subject of a public hearing held on February 15, 1972, in Washington, D.C. Following the public hearing, written comments were accepted through April 21, 1972. All comments, written and oral, were reviewed, and the regulations were subsequently revised as noted in the preamble.

Comments on the draft environmental impact statement for this proposed action were received from only three sources. In light of these comments, the discussion of alternatives was expanded to consider both less extreme and non-Coast Guard alternatives. The anticipated reduction in pollution and the expected public cost of compliance have been discussed qualitatively in paragraphs 2 and 4(b), since no quantitative data are available. Copies of comments received on the draft statement are attached.

This amendment promulgates new regulations that govern certain aspects of the design, equipment, and operation of facilities and vessels engaged in the transfer of oil. The purpose of the regulations is to prevent the discharge of oil into the navigable waters and contiguous zone of the United States. A minor change to Part 151 of the same Subchapter O, concerning submission of oil record books from vessels in coastwise service, is also included.

A notice of proposed rule making (CGFR 71-160) with respect to these regulations was published in the December 24, 1971, issue of the FEDERAL REGISTER (36 F.R. 24960). Subsequent thereto the Ports and Waterways Safety Act of 1972 (Public Law 92-340) was enacted and which requires regulations be promulgated by the Coast Guard governing ship design and operation to prevent pollution from marine operations. It is emphasized that the regulations promulgated herein are not those required by the Ports and Waterways Safety Act but are issued under the Federal Water Pollution Control Act.

A public hearing on the proposed regulations was held on February 15, 1972, and the record remained open for written comment until April 21, 1972. Some 185 written comments were received from the public in addition to 31 State and territorial government responses and written comments from Coast Guard field offices. As a result of the written and oral comments the proposed regulations have been revised in part.

Many changes have been made to improve clarity without significant change in substance. Those changes that significantly alter the proposed regulations and those items that received considerable comment but which were not revised are discussed in the following paragraphs.

A comment generally applicable throughout the regulations was that the petroleum industry generally uses "barrels" rather than "gallons" as its unit of liquid measure. This change has been made and all volumes have been cited in barrels and rounded off. For example, 10,000 gallons has been changed to 250 barrels (10,500 U.S. gallons).

Another general comment concerned the effective dates assigned to the various parts and the consequences of having different effective dates for vessels and facilities. As a result of this latter difficulty, and to allow adequate time for both vessels and facilities to make the necessary physical and administrative changes required, most of these rules become effective on July 1, 1974. However, although enforcement will not occur before July 1, 1974, it should be noted that §§ 154.500, 154.510, and 155,800 place special requirements on hoses and loading arms manufactured or placed in service after June 30, 1973. Also, to allow the Coast Guard a reasonable period of time to handle the many administrative problems and to assure compliance by July 1, 1974, all existing transfer facilities are required by § 154.110 to file before July 1, 1973, a letter of intent to operate. Section 154.110 becomes effective 30 days after publication of these amendments.

The applicability of Part 154 was questioned and, in particular, objection was made to defining a large facility by the oil capacity of the vessels it serviced. The proposed applicability of Part 154 to oil transfer operations between facilities and vessels with a tank capacity of 10,000 gallons (now 250 barrels) is retained. The Coast Guard believes that this definition is the only way to reflect the operation's potential to pollute. Facilities that service vessels of this minimum capacity, regardless of the amount of oil actually transferred, will do so with equipment and pumping capacities of very large size. As to those objecting to any limitation on the facilities governed, the Coast Guard finds that presently the larger facilities are the significant problem and further, that smaller operations encompass different problems requiring different solutions. If spill data indicates that small facilities are a problem warranting regulation then further rule making action will be undertaken.

Several definitions were added to § 154.105 for clarification of the text and, in particular, the definition of oil was modified to exclude LNG and LPG (liquefied natural and petroleum gases), since, as a result of their properties, they cause an insignificant oil pollution problem.

The regulation which received the most comment was that of Part 154 requiring facility permits to conduct oil transfer operations. Public interest groups strongly supported this proposal and further recommended that vessel to vessel transfers should also be subject to a permit system. Opposition to the permit system was based not upon the concept, but upon the onerous administrative burden that such a system would place upon the industry, States, and the Coast Guard. The status of the existing discharge permit system administered by the Corps of Engineers and the Environmental Protection Agency was cited as a specific example. Opposition further cited legislative history as a basis for argument that a permit system is illegal because Congress had specifically considered and rejected

such an approach to oil pollution prevention. The problem of State certification under section 401(a) of the Federal Water Pollution Control Act (FWPCA) was directly addressed by the Coast Guard to each of the State and Territorial Governments. Only 31 replies were received of which only 10 indicated the State had a certification program in existence.

The purpose of the Coast Guard program must be kept clearly in mind when considering permits for oil transfer operations. The program is intended to minimize the risk of a spill during operations which do not include any intentional discharge into the water at a facility which has, by appropriate local, State and Federal agencies, been authorized to be built and operated. It is now the view of the Coast Guard that this purpose can best be achieved by a direct regulatory approach. The permit program will be held in abeyance while experience is gained in controlling oil transfer operations. Based upon this experience, the need for a permit program will be reassessed. Therefore the proposed regulations have been extensively revised to delete the requirements concerning permits and in lieu thereof require each facility to file a letter of intent to operate, control the equipment and conduct of operations, and require operations manuals for each facility. The Coast Guard will inspect each facility, will issue a report of inspection to each facility, will invoke civil penalties for operations conducted in violation of the regulations, and will take action to suspend operations when conditions are found that constitute an unacceptable risk to the environment.

Section 154.110, Letter of Intent, specifies that all facilities that conduct oil transfer operations must submit a letter, 60 days in advance of intended operations, that specifies the name of the operator and the facility and its location. For mobile facilities, such as tank trucks, the Captain of the Port must be advised of specific transfer locations at least 4 hours before each transfer. Initial

filing of letters for existing facilities must be done by July 1, 1973.

Section 154.120, Facility inspection, is a revision of proposed § 154.370. The revision requires the facility operator to maintain a record of all inspections conducted by the Coast Guard and to conduct any tests which the Coast Guard deems necessary to determine the facility's compliance with these regulations. The entries in the record of inspection will be made by the Coast Guard inspecting personnel and will reflect the scope of the inspection conducted and the conditions found to exist at the time of inspection. The requirement that the facility conduct all required tests is in keeping with the intent of the proposed regulations and with current policy that testing is a responsibility of the equipment owner or operator.

A new § 154.140, Suspension of oil transfer operations, provides for the Captain of the Port to suspend oil transfer operations whenever, in his opinion, the conditions found at the facility are in such variance with the regulations that further operations would constitute an undue threat to the environment.

A revision to proposed § 154.360, Operations manual: Contents (now designated § 154.310) is to require a description of the "person in charge" training and qualification program to be included in the operations manual.

A new § 154.760, Operations manual: Changes, has been added to Subpart D, Facility Operations, to clarify the intent of the proposals that the facility operator must maintain the manual current to reflect the operations as conducted, and must submit copies of the changes to the Captain of the Port.

Section 154.500 has been modified to permit nonferrous flange materials. The omission of nonferrous flanges was an oversight to the draft proposals and the Coast Guard is not aware of any condition which prevents their usage.

Numerous comments requested that a pressure shutdown switch be accepted in § 154.500 to limit hose and

system pressures. The Coast Guard does not believe that a pressure switch and the necessary associated control circuitry is an acceptable method upon which to rely for pressure control and no change is made in this regard.

A new paragraph (b) has been added to § 154.530, Small discharge containment, to define the "hose handling and loading arm areas" as those areas traversed by the free end of the hose or loading arm to which any oil in the hose may be discharged.

Several comments proposed that § 154.545 should require vessels to be enclosed by booms during transfer operations. The Coast Guard is of the opinion that these regulations are sufficiently broad that a Captain of the Port may, if specific conditions warrant, require a boom in place about the vessel (see §§ 154.140, 154.300(b) and 154.310(m)). However, booms, regardless of size or type, are ineffective in a current of more than 1½ knots and therefore a mandatory requirement for booms in place is not considered appropriate.

Comments suggested that § 154.550, Emergency shutdown, should permit a communications system to suffice under certain conditions. The comments submitted are particularly valid for offshore type facilities where a pier or other such structure is not used. Therefore, the proposed section has been modified to permit dedicated communications systems to a continuously manned control station and to amplify acceptable types of systems and their location.

Second only to the proposed permit requirement in number of comments received was the requirement for lighting contained in §§ 154.570 and 155.790. The objections were basically: The illumination specified was excessive for the need; the high cost of providing the specified degree of lighting; the degree of lighting specified created a navigation hazard to transient vessels by blinding the navigating officers; and many communities have ordinances which would class such illumination as a

public nuisance. Because of the general objection to the degree of illumination specified, the Coast Guard conducted illumination surveys at existing facilities that were considered to be adequately illuminated. As a result of these surveys the required illumination level has been reduced to 5 and 1 foot-candles from 10 and 2 as proposed. Additionally, the regulation has been modified to permit the Captain of the Port to accept lighting from portable sources at small or remote facilities and to permit the vessel to provide facility illumination. Fixed lighting is preferred but in some remote areas power is not available and a fixed installation is impracticable.

Proposed §§ 154.710 and 720, which concern designation and qualification of persons in charge, have been combined into a new § 154.710. Additionally, proposed § 154.710(a)(2) has been modified to permit the required 48 hours of experience to be at any facility engaged in oil transfer operations with the provision that the designee must also be familiar with and qualified to operate the facility for which designation is given. This change was made to facilitate the use of personnel at various locations. The Coast Guard retains the prerogative to review the designation of a person in charge to assure he has adequate experience.

Section 154.740 is changed to require the facility operator to maintain a record of facility inspection as previously discussed.

Proposed § 154.365 has been revised and relocated as §§ 154.760 and 154.770, Operations manual: Changes, and availability, respectively. The revision was made for clarity and the relocation was made because the regulation is more a condition for operation than a general requirement.

On June 15, 1972, the United States published a notice for the purpose of implementation and enforcement of laws and treaties in the contiguous zone as permitted by Article 24 of the Convention on the Territorial Sea and

Contiguous Zone. Therefore the applicability of Part 155 has been expanded to govern vessels in the navigable waters and contiguous zone in accordance with section 311 of the Federal Water Pollution Control Act. The Contiguous Zone is that area of water extending seaward 9 miles from the 3-mile territorial sea and thus, in general, extends applicability of the vessel oil pollution prevention regulations to 12 miles off shore.

Part 155.105 has several new definitions added for clarity in application of the part.

A great deal of criticism concerned the definition of "vessel" excluding public vessels, Navy or Coast Guard vessels, and thereby exempting them from the provisions of this part. The definition used is that contained in the Federal Water Pollution Control Act, as amended. However, attention is invited to Executive Order 11507 signed February 4, 1970, which requires all Federal vessels and facilities to have programs completed or underway by December 31, 1972, which will bring such facilities and vessels into compliance with air and water quality standards. The Army, Navy, and the Coast Guard have comprehensive programs underway and their vessels will, in fact, meet generally more restrictive requirements. Coast Guard vessels will for example, when in the navigable waters and contiguous zone, retain all vessel-generated wastes (sewage, laundry drains, galley waste, bilge wastes, and slop oil) on board.

A new § 155.130, similar to proposed § 154.140, has been added to provide that the Captain of the Port or the Officer in Charge, Marine Inspection, may suspend oil transfer operations if he deems that a severe risk to the environment would otherwise exist.

The inland barge industry entered strong objection to the proposed requirements for double wall construction of inland tank barges. The basis of the objection is that the costs have neither been adequately investigated nor has a case been made that double wall construction would significantly reduce oil pollution. The Coast Guard has, in co-

operation with the Maritime Administration, entered into a study of costs and alternatives, including complete double hull construction, which will be completed within 18 months. Therefore, implementation of proposed § 155.305 is being withheld pending the results of the study.

Proposed § 155.320 *Fuel oil discharge containment* has been extensively revised because of many problems which existing vessels would have in complying with the proposed regulation. Specifically, present fuel tank fill and vent lines on river towboats are so arranged as to make centralization economically impossible. As modified, the regulation requires all new construction to have an installed deck spill containment system to retain all small spills and overflows that occur during vessel fueling operations. For existing vessels, the use of small portable spill containment systems is allowed. Additionally, it was pointed out that many small river towboats are fueled with gas station type fuel hoses and have not been a pollution source. Therefore, for existing vessels, the proposed regulations have been modified to allow the use of flush deck fuel fittings when serviced by an automatic back pressure shut-off nozzle.

Sections 155.340 and 155.350, bilge slops, have been revised to clarify that these requirements apply only to vessels with machinery space bilges. Specifically, the requirements of these sections do not apply to the double bottoms of barges which would need pumping only in the event of a leak or casualty.

The applicability of §§ 155.340 and 155.350 has been clarified by substituting "Ocean or Coastwise service" for the proposed "international voyages." One purpose of this section is to provide and establish an internationally accepted standard fitting on all vessels using facilities that service both domestic and international vessels. The proposed fitting is one recognized by the Intergovernmental Maritime Consultative Organization (IMCO).

Section 155.350 has been modified to establish a 4-inch flange as the inland standard for oily waste discharge con-

nections instead of the proposed large international standard fitting. This was done at the request of the inland industry which considers the international fitting unnecessarily large for small inland vessels.

Proposed §§ 155.400, 155.410, 155.420, and 155.430 concerning the sealing of vessel overboard discharge valves have been deleted. Most comments indicated that such system was an unnecessary redundancy in view of the other sections of the regulations; that sealing would not be effective and would not provide a significant deterrent to intentional discharges of oil or oily waste; and that it would not be enforceable. Note that proposed §§ 155.450 and 155.460 have been renumbered §§ 155.400 and 155.410 respectively. With the deletion of the valve sealing requirements the proposed § 155.440: Placard, has been made applicable to all domestic vessels over 26 feet in length to alert shipboard personnel of the consequences of an intentional or careless discharge of oil.

Section 151.470 *Prohibited oil spaces* has been modified to apply only to self-propelled vessels. Self-propelled vessels have been the major source of spills from oil in forward spaces. It was pointed out that coastwise barges presently carry oil in their very large forward compartments and the proposed regulation would reduce their capacity by approximately 20 percent until the vessels could be modified. Since many of the technical details of defining the prohibited spaces on a barge are dependent upon much of the same data to be developed by the inland barge study, adoption of this proposed section is being stayed.

Many comments interpreted § 155.470 (b) as prohibiting vessels from carrying oil in wing tanks adjacent to the hull plate. Paragraph (b) applies only to spaces forward of the collision bulkhead specified in § 155.470(a).

Comments from the inland barge industry stated that their methods of operation were such that the requirement of § 155.700 *Designation of person in charge* could not be

accomplished. The Coast Guard feels it is essential that the owner, or an agent acting on behalf of the owner, recognize a responsibility for the conduct of operations on the vessel. Therefore, § 155.700 has been modified only to the extent of recognizing that an agent may act on behalf of the owner in designating persons in charge.

The major concern voiced about Part 156, Oil transfer operations, was that the Coast Guard did not assign an overall responsibility and therefore, liability for oil transfer operations. That is, the vessel and the facility presently share responsibility, each being responsible for his own area and jointly responsible for common areas (such as mooring lines, adequate freedom in hoses, etc.), and neither has overall responsibility for the entire operation. The Coast Guard feels it cannot go beyond the designation of responsibility which has been done in the proposed regulations. However, some wording changes have been included to recognize that a person in charge need not completely inspect both units and that he may accept the signature of the other unit's person in charge on the declaration of inspection as satisfactory evidence of the acceptable condition of the other unit.

In consideration of the foregoing, Subchapter O, Title 33, Code of Federal Regulations is amended to read as follows: